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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re A.O., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

A.O.,

Defendant and Appellant.

A154824

(Contra Costa County
Super. Ct. No. MSJ15-00164)

Defendant A.O. appeals following his juvenile adjudication for assault with force likely to cause great bodily injury with a gang enhancement. He contends that the evidence at a contested jurisdiction hearing was insufficient to support the gang enhancement allegation. He also challenges the juvenile court's dispositional order committing him to juvenile hall until age 21 but providing for an earlier release if and when he successfully completes a court-ordered treatment program. He contends that the juvenile court improperly delegated its authority to determine the length of his confinement to the probation department. We affirm the judgment.

BACKGROUND

Defendant was a member of the Goon Squad Norteños (GSN), a subset of the Norteño criminal street gang. Defendant was declared to be a ward of the court after the People filed a Welfare and Institutions Code section 602 petition against him for carrying

a switchblade knife (Pen. Code, § 21510)¹ and misdemeanor vandalism and petty theft (§§ 594, subd. (b)(2)(A), 484, 488).

In early 2016, the police conducted a probation search of defendant's home and found evidence of gang affiliation, including red clothing, gang graffiti on the walls, as well as handwritten letters to GSN members and paperwork with GSN material on them. Also in early 2016, defendant violated his probation and was sent to a youth rehabilitation facility. He successfully completed parole following early release but was later charged with numerous firearm counts and admitted participation in the GSN criminal street gang (§ 186.22, subd. (a)). Defendant was sent back to the youth rehabilitation facility and later admitted to a probation violation for tagging a book with gang graffiti. At age 16, defendant was again released from the youth rehabilitation facility.

I. The May 10, 2018 Offense

Eight days after his second release from the youth rehabilitation facility, defendant went to the territory of the rival Sureño gang with two companions. All three wore red, the color associated with the Norteños, and defendant wore a red belt with an "N" on the buckle. In a supermarket parking lot, the three attacked J. Ochoa (Ochoa). Ochoa was associated with the South Side Locos, a subset of the Sureño gang, and he was wearing a Raiders jacket, an item associated with the Sureños. Defendant yelled, "Fuck SSL," referring to the South Side Locos, and one of the three attackers punched Ochoa in the face. After Ochoa fell to the ground, defendant kicked him in the face and took Ochoa's Raiders jacket. A witness who later testified against defendant saw some of the attack from his car. Ochoa suffered a broken rib, a broken jaw, and fractures in his eye socket.

Defendant was arrested a few days later with one of Ochoa's co-attackers, R.D. Police recorded defendant and R.D. in the backseat of the patrol car, where one said that the police "were going to try to put a gang case on them." In the car, defendant stated, "They're going to charge us with [Ochoa]'s shit. They're going to say we jumped him."

¹ All further statutory references are to the Penal Code unless otherwise specified.

At a subsequent police interview, defendant admitted that he was a Norteño, that he fought Ochoa, and that he knew Ochoa was a Sureño. Defendant conceded to police that he had bragged about the attack and that he would get credit with his gang for it. Defendant also said that he had a video of the fight on his cell phone.

The police recovered a video from R.D.'s cell phone, wherein R.D. displayed Ochoa's Raiders jacket and said, "We're on your block." On this same video, defendant said, "We dropped his shit." The police also recovered a separate video of part of the attack on Ochoa from R.D.'s cell phone.

For the assault on Ochoa, the People charged defendant with assault by force likely to cause great bodily injury (§ 245, subd. (a)(4)), with a criminal street gang enhancement (§ 186.22, subd. (b)(1)) and a great bodily injury enhancement (§ 12022.7, subd. (a)).

II. Detective Vandiver's Testimony

At defendant's contested jurisdiction hearing, Detective Paul Vandiver of the Concord Police Department testified as an expert on criminal street gangs and on GSN. Vandiver was a member of the police's violence-suppression unit and had been investigating violent street crimes and other violent activities for two-and-a-half years. He had approximately 17 years of prior law enforcement experience: Ten of those years were at the Concord Police Department and three were with the special enforcement team handling street-level narcotics, gang, and prostitution crimes. He received formal street gang training as a sheriff in Nevada and had attended seminars, read literature on California gangs, and had hundreds of hours of on-the-job training dealing and speaking to gang members throughout his career. Vandiver had also testified as a gang expert in three prior cases regarding crimes committed by subsets of the Norteño gang.

Regarding GSN, Vandiver testified that he had spoken with GSN members six to eight times. He further stated that he had spoken with other law enforcement officers regarding GSN and had reviewed police reports for GSN arrests. He was familiar with GSN graffiti, hand signs, the number of members in the gang, how one would join, and how one would receive status in GSN's ranks. Vandiver investigated crimes where GSN

members were suspects twice: once in this case and once in June of 2015, when he investigated a GSN member for possession of a concealed firearm. Vandiver conceded that he had not read any academic materials, watched documentaries, or received training specifically related to GSN.

Vandiver testified that prospective gang members in GSN “have to put in . . . work,” which means “maybe fighting a rival gang member, jumping a rival gang member, committing any assortment of crimes on either rival gang members or people to show that you’ve put in work for the gang.” Putting in work is a way for members to move up within the gang’s ranks. Vandiver stated that defendant would get “credit” for Ochoa’s assault because that constituted putting in work for GSN.

Vandiver further explained that GSN commits many shootings, possession of firearms crimes, and robberies, as well as homicides, assaults, and other crimes. He said that GSN uses those activities to promote the gang and continues to commit those crimes. He also testified that attacking members of a rival gang is common in gang culture and that GSN benefited from attacks on rival gangs because these attacks “instill fear in rival gang members such as the South Side Locos Sureños” and “gained compliance in that area[,] almost like taking over an area.” Because of assaults, the gang is “now feared in that area, and that’s a long-term goal.” This fear also helped GSN “perpetuate their criminal activities” by enabling it to commit crimes like “selling drugs, doing robberies, and shootings,” while not having “to worry about rivals attacking them due to the fear of [GSN].”

The court sustained the assault charge against defendant and both enhancements. The court redeclared wardship, committed defendant to a county institution, and set a maximum custody time of 16 years and 226 days or until age 21, whichever occurs first. The court also ordered: “Minor to participate in the [C]ounty [I]nstitution [P]rogram, YOTP [Youthful Offender Treatment Program]. Minor must successfully complete all phases of the program, follow all treatment requirements, and obey all rules and regulations.” Defendant timely appealed.

DISCUSSION

I. The Gang Enhancement

Defendant contends that the evidence was insufficient to sustain the gang enhancement finding because the People failed to prove that (1) defendant committed a felony for the benefit of, at the direction of, or in association with a criminal street gang; and (2) one of GSN's primary activities was one of the enumerated offenses in section 186.22, subdivision (e). The evidence was sufficient to prove both of the challenged elements.

When determining whether the evidence was sufficient to sustain a criminal conviction, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640; see *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Reversal is not warranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standards govern review of the sufficiency of the evidence in juvenile cases. (*In re Cesar V.* (2011) 192 Cal.App.4th 989, 994.)

A. *The Crime Was Committed for the Benefit of a Criminal Street Gang*

The California Street Terrorism Enforcement and Prevention Act (STEP Act) (§ 186.20, et seq.) criminalizes specified acts when committed in connection with a criminal street gang. It also provides for enhanced punishment for a felony committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1).) Defendant claims that the People introduced unsubstantiated expert opinion to show that he committed the assault against Ochoa for the benefit of or in association with a criminal street gang, but defendant ignores the substantial factual evidence supporting this element of the gang enhancement finding.

First, defendant does not challenge the court's finding that he was a GSN member. The clothing he wore, his tattoos, the GSN graffiti in his room, his correspondence with GSN members, his prior conviction for participation in the GSN gang, and Vandiver's expert opinion all support this finding. Next, all of Ochoa's attackers wore red, the Norteños' color; defendant knew he was in Sureño territory when he attacked Ochoa; he knew Ochoa was a Sureño; and he yelled, "Fuck SSL" just before the attack. One of the attackers videotaped the assault, and defendant and R.D. made a video after displaying Ochoa's Raiders jacket saying, "We're on your block," and "We dropped his shit." Defendant also bragged about the attack and conceded he would get credit for it in his gang. Based on these facts, not on speculation, Vandiver opined that defendant's attack benefited GSN because it instilled fear in rival gang members and assisted GSN in perpetuating criminal activities. The underlying factual evidence supports Vandiver's opinion, and both provide sufficient support for the court's gang enhancement finding.

People v. Franklin (2016) 248 Cal.App.4th 938, *People v. Ochoa* (2009) 179 Cal.App.4th 650, and *People v. Ramirez* (2016) 244 Cal.App.4th 800, cited by defendant, are distinguishable. In each, an expert opined that the crimes committed therein benefited a gang, but nothing in the offenses' circumstances supported the experts' inferences that they were gang related. (*Franklin*, at pp. 949–952 [the defendant committed burglary, assault, and false imprisonment against his ex-girlfriend in gang territory, but no evidence showed that fellow gang members knew of or participated in the crimes, and the expert casually dismissed the possibility that the crimes could be for the defendant's benefit]; *Ochoa*, at pp. 661–662 [defendant committed a carjacking but did not call out a gang name, display gang signs, wear gang clothing, engage in gang graffiti, brag about the offense; or commit it with gang members, against a rival gang member, or in gang territory]; *Ramirez*, at pp. 818–819 [during the crimes, no gang signs were flashed, no gang names were called out, no gang attire was worn, and the victims were not gang members].) As previously set forth, the factual circumstances of defendant's assault on Ochoa differ significantly.

B. Evidence of GSN's Primary Activities

Under the STEP Act, a “criminal street gang” is “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [subdivision (e)]” (§ 186.22, subd. (f).) The acts set forth in section 186.22, subdivision (e) include murder, assault, battery, possession of firearms crimes, robberies, and other felonies. (*Id.*, subd. (e).) Defendant contends that the People did not establish that one of GSN’s “primary activities” was the commission of one or more of the specified offenses.

To show the nature of the gang’s primary activities, the prosecution may rely on past and present criminal activities of the gang, but isolated criminal conduct is not enough. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in [section 186.22, subdivision (e)].” (*Id.* at p. 324.) Expert testimony founded on the expert’s conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies may be sufficient to prove a gang’s primary activities. (*Ibid.*; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 (*Duran*).)

In *Duran*, *supra*, 97 Cal.App.4th at page 1455, for example, the People’s gang expert testified that the gang sought to put fear into the community and engaged in the sale of narcotics, robbery, and assault often. The gang expert had personal experience investigating many gang-related crimes, contacting gang members, and gathering gang-related intelligence. (*Id.* at p. 1465.) The People also introduced evidence of one robbery and one narcotics offense by gang members. (*Ibid.*) The court concluded that the expert’s testimony and the People’s evidence of gang offenses supported the jury’s finding that the gang members were engaged in more than just the occasional sale of narcotics, robbery, or assault. (*Id.* at pp. 1464–1466.)

Similar to the expert in *Duran*, Vandiver testified regarding his extensive experience with criminal street gangs. Although he had not read literature or seen documentaries specific to GSN, he testified regarding the gang's origin and operations in Concord; he investigated two GSN crimes; he spoke with six to eight GSN members and to other law enforcement officers regarding GSN; and he reviewed police reports regarding GSN crimes. Vandiver testified that GSN committed many shootings, robberies, and possession of firearms crimes. He had dealt with GSN homicides, stabbings, assaults with a deadly weapon, batteries, burglaries, and sales of narcotics and firearms. Vandiver stated that GSN committed these crimes to promote the gang, the gang was still committing these crimes at the time of his testimony, and defendant's assault facilitated GSN's drugs sales, robberies, and shootings by intimidating rival gangs. The People also introduced evidence of two GSN possession of firearms offenses in 2015 and the instant assault. This evidence supports the conclusion that GSN consistently and repeatedly, rather than occasionally, committed shootings, robberies, and possession of firearms crimes. (§ 186.22, subd. (e)(1), (2), (31)–(33).)

We reject defendant's contention that the People's evidence suffers from the same evidentiary failings identified in *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*) and *People v. Perez* (2004) 118 Cal.App.4th 151 (*Perez*). In *Alexander L.*, the only evidence of the gang's primary activities was the expert's statement: “ ‘I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotics violations.’ ” (*Alexander L.*, at p. 611.) The expert said nothing else, and the defendant objected that this testimony lacked foundation; on appeal, the court agreed, finding it “impossible to tell” whether the expert's knowledge was based on highly reliable sources, such as court records of convictions or his own investigations and conversations with gang members, or on “entirely unreliable hearsay.” (*Id.* at p. 612 and fn. 4.) Because the testimony lacked foundation, it did not help the fact finder determine whether the gang was a criminal enterprise or a group whose members just happened to commit crimes. (*Id.* at pp. 611–

612.) Further, the expert contradicted himself on cross-examination, stating that the vast majority of cases he knew of related to the gang were graffiti cases. (*Id.* at p. 612.)

In *Perez*, the jury convicted the defendant of gang-related attempted murder for shooting an Asian teenager in retaliation for a gang member's death. (*Perez, supra*, 118 Cal.App.4th at pp. 153–154.) The prosecution's gang expert testified that members of the defendant's gang had attempted to kill an Asian child six years earlier, and the prosecution presented evidence that the gang had engaged in retaliatory shootings of Asian youths less than a week before the present shooting. (*Id.* at pp. 158, 160.) The court concluded this evidence was insufficient because, at best, it showed only that members of the defendant's gang had committed isolated attempted murders. (*Ibid.*)

Unlike the experts in *Alexander L.* and *Perez*, Vandiver did not give foundationless testimony or testify to only isolated crimes; instead, he opined that GSN frequently committed many of the crimes enumerated in section 186.22, subdivision (e) and did so on an ongoing basis. Vandiver supported his opinion with an adequate and reliable factual basis. We therefore conclude that the People's evidence was sufficient to satisfy the primary activities element.

II. The Disposition Order

Defendant next argues that by committing him to YOTP, the juvenile court impermissibly delegated authority to determine the length of his commitment to the probation department. He contends that the probation department decides whether he has completed the phases and requirements of YOTP, and therefore whether and when he will be released in violation of the California Constitution's separation of powers clause and his right to state and federal due process.

Under article III, section 3 of our state Constitution, "[t]he powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." "It is well settled that courts may not delegate the exercise of their discretion to probation officers," (*In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1372) but "a court may dictate the basic policy of a condition of probation, leaving specification of details to the

probation officer.” (*In re Victor L.* (2010) 182 Cal.App.4th 902, 919.) Because the juvenile court retains the authority to determine whether defendant successfully completes YOTP, it has not delegated that authority to the probation department as defendant contends.

In *In re J.C.* (2019) 33 Cal.App.5th 741 (*J.C.*), Division Five of this court recently rejected a claim similar to the one before us. There, the juvenile court committed a minor to a county institution until his 21st birthday, unless he successfully completed YOTP. (*Id.* at pp. 743–744.) The minor argued that the court improperly delegated the authority to determine the length of his commitment because the probation officer would determine whether he completed YOTP. (*Id.* at pp. 744–745.) Our colleagues rejected this argument, relying on *In re Robert M.* (2013) 215 Cal.App.4th 1178, 1182, wherein the court considered a challenge to an order requiring a minor to complete sex offender counseling at the Division of Juvenile Facilities (DJF) and then to return to the court for possible sentence modification. In *In re Robert M.*, the court concluded that the order did not impermissibly intermingle the responsibilities of the probation department and the DJF because, although a minor is answerable on a daily basis to those who run a custodial treatment program, under the statutory scheme, the juvenile court retains supervision and control over the minor. (*In re Robert M.*, at p. 1185.) The court in *J.C.* similarly found “the juvenile court [] retains the ultimate authority to determine whether and when Minor successfully completes YOTP.” (*J.C.*, at p. 745.) The court also noted that the juvenile court had scheduled a YOTP review date, undermining the minor’s argument that the court delegated the determination of his YOTP completion to the probation officer. (*Id.* at p. 746.)

We find *J.C.* persuasive, and, on similar facts, we reach the same conclusion. The juvenile court set defendant’s maximum custody term and retains authority to determine whether defendant successfully completes YOTP. The juvenile court also set a hearing to review defendant’s YOTP progress. It did not delegate authority to determine the length

of defendant's commitment to the probation department in alleged violation of the separation of powers doctrine.²

Defendant's due process argument fails for similar reasons. Defendant argues that by allowing the probation department to determine whether or not he has successfully completed YOTP, the juvenile court circumvents Welfare and Institutions Code section 777 by allowing the probation department to determine that he has violated probation without notice or a hearing. But the juvenile court retains the authority to determine whether defendant successfully completes YOTP. Furthermore, Welfare and Institutions Code section 777, which requires that "[a]n order changing or modifying a previous order by removing a minor from the physical custody of a parent . . . and directing . . . commitment to a county institution . . . shall be made only after a noticed hearing," has no bearing in this case because the court ordered defendant committed to a county institution for a maximum term of confinement unless he completes YOTP sooner. It did not authorize the probation department to change or modify a previous order or to remove defendant from his parent's physical custody. (*J.C.*, *supra*, 33 Cal.App.5th at p. 748, fn. 8.)

Finally, to the extent defendant suggests that the probation department might unfairly evaluate his performance in YOTP, defendant (or his parent or attorney) retains the ability to raise that issue before the juvenile court by filing a petition under section

² Defendant sought judicial notice of a webpage entitled, "Contra Costa County Probation Overview, County Probation Officer Philip Kader" and the YOTP handbook, stating they were relevant to his first supplemental brief which discussed an opinion similar to *J.C.* from Division Five of this court. We struck defendant's first supplemental brief when the opinion it discussed was depublished but allowed him to file briefing on *J.C.* In his second supplemental brief, defendant mentions only the YOTP handbook. Like the court in *J.C.*, we need not decide whether this handbook is judicially noticeable under Evidence Code section 452, subdivision (h), because, even assuming it is, it supports our analysis rejecting defendant's challenge. The YOTP handbook "plainly contemplates the probation officer will provide the juvenile court with an opinion about whether the minor has successfully completed the program and will make a recommendation to the court regarding the minor's release. The court will then make the final determination on these issues." (*J.C.*, *supra*, 33 Cal.App.5th at p. 747.)

778 to change, modify, or set aside its order on the grounds of a changed circumstance.
(*J.C., supra*, 33 Cal.App.5th at p. 747; see Welf. & Inst. Code, § 778, subd. (a)(1).)

DISPOSITION

The judgment is affirmed.

BROWN, J.

WE CONCUR:

POLLAK, P. J.

STREETER, J.